No. 4568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUISEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

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The plaintiff in error has presented a typewritten reply brief to the brief heretofore filed on behalf of the Government in this case. He seeks to "clarify" certain issues which he contends "were only clouded by the brief of the defendant in error". It will be noted, however, that his clarification does not take the form of any close consideration of the evidence.

Note is taken to the Government's reference to the *Dealey* case and to what is said in that case of a charge of *general* conspiracy as distinguished from a charge of a *particular* conspiracy, and it is pointed out that in the *Terry* case there is also a general conspiracy charge, but the distinction between the evidence in the instant case and that in the *Terry* case

constitutes the real distinction here contended for. We merely noted the general character of the charge as being sufficient to authorize the court and jury to consider the broad conspiracy here proven.

The charge here is the formation of a conspiracy to commit divers offenses against the United States in general. As far as the indictment is concerned, it is not limited to any particular enterprise. It is broad enough to include the large enterprise actually proven.

Nor does the case present any difficulties in regard to the time element. It is charged that the parties conspired on February 1st, 1924, the exact date unknown, and that it was continuous at all times up to the filing of the indictment. The proof did not vary from such time for it was shown that the project during the year of 1924 up to the time of the sinking of the *"Guilia"* was flourishing like a "green bay tree". It is thus not the case of a charge for example, the sale of narcotics on February 1st, 1924, and the proof of the sale described the preceding autumn for the Government did prove the actual commission of the crime as of the very date alleged. It does not render the Government's case defective or constitute a variance for it to prove that the crime was larger and of greater proportions or that it had existed for a longer period than charged. In other words, the conspiracy was effective on February 1st, 1924, and during the succeeding summer and the same conspiracy was effective during the preceding autumn.

It is therefore not the case of a charge of an act as of one date and the proof of the act as of an earlier date, although it is well settled that in the latter situation—

> "Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment and within the statute of limitations would be sufficient."
>
> *Ledbetter v. U. S.,* 170 U. S. 606; 42 L. Ed. 1162, 1164.

There is also an assumption on the part of the plaintiff in error that the Government's proofs are limited by the overt acts set forth, but it is established beyond question that the allegation in an indictment for a conspiracy of one or more overt acts has not any such effect. It is only necessary for the Government to allege and prove *one* act by *one* conspirator done to *effect* the *object* of the *conspiracy.* It may even be not criminal. There is no necessity, in order to establish a crime, to allege or prove more than *one* such act. Hence it would be absurd that the case of the Government is to be considered to be limited to such overt act or acts, as may have been alleged.

The *Terry* case only established that, accepting the charge in the indictment as general (although it may have been limited to the incident at Allen's Wharf by virtue of the language in the charge) from

the *character* of the Government's *proof,* it was to be taken as limited to that incident. In other words, it was the proofs that limited the conspiracy and not the indictment.

THE EVIDENCE IN THE INSTANT CASE.

Here the testimony is ample and overwhelming to establish the broader conspiracy and to link together in a single enterprise all the various incidents and groups.

To refer to the salient features of the evidence:

The head and front of the conspiracy was defendant *Daniel Henderson.* He is shown to have been the owner of the liquors sought to be introduced by the *"Ardenza"* and *"Guilia".* He had brought liquor from Scotland to Havana and even had a warehouse there to store it (R. 161). He began operations at San Francisco as at least as early as the spring of 1923. Witness MacNevin had started a mining venture with one Manning. A little later Manning brought in Henderson and Stevens, represented as being English capitalists (R. 51). These parties at first made their headquarters at the Colombo Mining Company, San Francisco. Henderson had as a confidential agent or representative one *Guyvan McMillan* (R. 159). He seemed to be acting as secretary for Henderson (R. 50). At that time Stevens was the owner of the ship *"Ardenza"* and *Henderson owned* the *cargo* (R. 51). The ship was standing outside the heads of San Francisco Bay (R. 51).

In such state of the situation, plaintiff in error *Campanelli* became acquainted with *Henderson* and *McMillan,* and after a short acquaintance entered into the conspiracy with them, especially with Henderson, whereby Campanelli was to receive $1.00 a case for liquor delivered from Henderson's ships (R. 160). The *"Ardenza"* and *"Frontiersman"* were mentioned. Campanelli's duty was to appear at the point of delivery, collect the money for the liquor, and either given it to Henderson at the Stanford Court Apartments or bank it for him (R. 160). The bank account so established commenced July 21st, 1923, and ended August 28th, 1924 (R. 195).

In such state of dealings between the parties, early in 1924, Henderson planned to bring another cargo of liquor from Havana. For that purpose he purchased the steamer "Frontiersman" at San Pedro, this purchase being effected by Henderson's agent, McMillan, who took the title, and with the assistance of Campanelli (R. 119). Thereupon McMillan arranged for the crew for the ship going to Havana (R. 231) and Campanelli and Henderson went to Havana, Henderson there taking charge (R. 242). On return Campanelli, at Henderson's request, arranged for small boats to take off the cargo and take supplies to the ship, by that time called the "Guilia", as well to go to Ensenada to clear up a difficulty over the coaling (R. 162).

It is thus seen that from July 21st, 1923, up to August 28th, 1924, there was a general conspiracy of the type charged in the indictment; that Henderson

was the center and chief of the enterprise, that McMillan was closely associated with him and that from July 21st on Campanelli had definitely entered the conspiracy and was engaged in assisting Henderson in carrying it out.

The liquor, as the jury may have inferred, was brought from Scotland and placed in a warehouse or depot at Havana with the intention of bringing cargoes off the heads at San Francisco for introduction to the San Francisco market through small boats in the manner disclosed by Campanelli, he to collect the money and bank it for Henderson.

The Government did not charge in the indictment the *means* by which the conspiracy was to be carried out. It is a familiar rule that where the enterprise is criminal, that is to say where the conspiracy is to commit crime, it is not necessary to set forth the means.

Proffitt v. U. S., 264 Fed. 299.

It is only necessary to set forth the means when the main purpose of the conspiracy is not unlawful. Here the thing charged was unlawful. It was not necessary to set forth the means and the Government was entitled to prove the means used or any of them, without averment. There is no more reason for including the *"Guilia"* as one of the means than there is for including the *"Ardenza"*. The conspirators were indifferent as to means. They had used other vessels, and probably in the beginning did not contemplate any particular vessel.

In any event the group of seamen concerned in the trip of the *"Guilia"* are merely in the situation of parties coming into the conspiracy later with knowledge of the conspiracy. As far as concerns Henderson, McMillan and Campanelli, their actions all pertained to the center of the conspiracy which was carried out by subordinate groups and joined them all together, just as the agreement of Campanelli with Henderson referred in the same connection to both ships. He was to get $1.00 a case for liquor removed from the *"Ardenza"* as well as the *"Guilia"*.

(a) There Was No Variance.

The plaintiff in error still contends that there was a variance between the indictment and the proofs in that outside of the arrest of Captain O'Hagan there was no evidence of the formation of a conspiracy at the Bay of San Francisco.

There is no reference to or discussion of the cogent proofs of the Government in this regard cited in its opening brief; for, to say nothing of numerous other circumstances, we may instance, that about 20 days after leaving Havana, Campanelli received a 'phone call from Henderson inviting him to the Clift Hotel in this city where Henderson told him that there were 8500 cases of liquor aboard the *"Guilia"* and he would like to have Campanelli assist in the matter of disposing of the cargo, offering to pay him $1.00 a case and suggesting that one Alioto, who had assisted in unloading liquors on previous occasions, would help

in the matter of unloading the *"Guilia"*. Thereupon at Henderson's request, Campanelli arranged with Alioto to unload the liquor at $2.50 a case (R. 151).

A week later the same parties met at Columbus Avenue, in the same city, wherein an agreement was made that Campanelli go to Ensenada to assist in coaling the *"Guilia"* (R. 152). Later, on the arrival of the ship at Henderson's direction, Campanelli made a trip out to the *"Guilia"* by the launch *"Gnat"* transferring some provisions thereto (R. 163).

On the 8th or 10th day of September, 1924, Campanelli hired from Alioto the boat *"Gnat"* to bring provisions out. Later he received from Campanelli $2500.00 on account of bringing in liquor, the receipt being at Columbus Avenue, this city (R. 121). In fact, it is difficult to conceive of a case where the proof of the venue or the proof of the conspiracy being in San Francisco was more clearly proven.

(b) As to Testimony Regarding the "Ardenza".

The reference to the *"Ardenza"* first came into the case by the testimony of witness MacNevin (R. 51) where it is seen that such testimony appears in the record by question and answer and that there is no objection whatever to that feature of the case.

The so-called "Black Book" was not referred to in the case except at page 52 of the record; there is no objection to the receipt of that testimony. The subsequent motions to strike out, even if they were directed to such feature, which they were not, would

be within the discretion of the court as to anything not previously objected to.

The only subsequent reference to the *"Ardenza"* were in the testimony of witness Oftedal wherein he detailed certain statements as made by Campanelli. The first statement of Campanelli was in writing (but did not refer to the *"Ardenza"*). Upon being offered, Campanelli's counsel objected that it was *immaterial, irrelevant and incompetent,* had no proper *foundation,* and not shown to have been obtained freely and *voluntarily* (R. 144). Thereupon the witness was questioned at length in an endeavor to show the involuntary character of the statements, but without result.

Thereupon witness was asked as to a further conversation with Campanelli in December, 1924. The only objection made by counsel for Campanelli was, "May we have the same objection as to this testimony as we did to the other", evidently referring to the previous matter. Thereupon the witness detailed what Campanelli said of the enterprise and this without objection on behalf of Campanelli. Certain objections were made on behalf of De Maria on points that would not have availed to Campanelli. The testimony so given was to the effect, among other things, that Henderson would arrange with Campanelli every so often to figure out how much was due as a result of the quantity unloaded from the ship *"Ardenza"*, as well as the *"Frontiersman"* and the *"Giulia"* (R. 155). There was no objection by Campanelli to this

statement. Further on Oftedal related more in detail the admissions of Campanelli, referring to his statement that Henderson entrusted him with large sums of money and said he was to receive a dollar for each and every case delivered from these certain ships—the *"Ardenza"* and the *"Frontiersman"* whether he took part in the sales or not; that his duty was to appear at the point of delivery, collect the money, sometimes pay it to Henderson and other times deposit it in the bank (R. 160). Campanelli, himself, according to the statement, thus grouped the two ships together as concerned in his deal, nor was there any objection made to that testimony (R. 160).

We have not found any subsequent reference to the *"Ardenza"* or any reference to the *"Ardenza"* in the testimony of Oftedal, except at pages 155 and 160 of the record, wherein it is seen that no objection was made to the receipt in evidence as to testimony of these features of the statement of Campanelli. There were, perhaps, motions made subsequently to strike out (R. 202). But the court's attention was not directed to any part of this statement, but included all, and the objection stressed was that the statement was not voluntary.

We think the rule is that where testimony is not objected to previous to its receipt, a motion to strike out is substantially within the discretion of the court, and that error may not be assigned to the refusal thereof.

But we need not dwell upon these features of the record, as manifestly against any objection that could have been interposed; it was proper to prove that the three named conspirators, *Henderson, McMillan* and *Campanelli* used the various means referred to in carrying out the deal, including the possession, control or use of the different vessels, the *"Guilia"*, the *"Ardenza"*, the *"Heyman"*, the *"Gnat"*, or any other ship which the jury may have inferred was used in the enterprise.

First there is nothing in the contention that the matter was too remote because the ship was owned by one Stevens who was not a defendant in the present case; for while Stevens owned the vessel, *Henderson, a named conspirator, owned the cargo* (R. 51). Moreover, Stevens was associated with Henderson (R. 51). He was one of the parties who went to Havana at the time that Henderson and others went there to obtain for the *"Guilia"* the cargo of liquors. O'Hagan states that Stevens also was present with Henderson and Campanelli (R. 241). Accordingly, Stevens would have been a conspirator and would have been included in the designation of one of the conspirators unknown to the Grand Jury and referred to in the indictment.

Thomas v. U. S., 156 Fed. 897.

It would have been permissible, indeed, under such a state of facts to prove the act or statement of Stevens in carrying out the conspiracy. But, as we have

seen, Campanelli, by his own statement, was closely connected with Henderson and McMillan, and that Henderson owned the *cargo* of liquors on the *"Ardenza"*.

As to the objection that the conspiracy was charged as of February 1st, 1924, and the *"Ardenza"* incidents were in the Spring of 1923, the answer is clear:

As to the Fact.

The acquaintance of Witness MacNevin with Henderson and McMillan began in the "Spring of 1923", but it was sometime later (at a time not stated) that Henderson made to MacNevin the reference to the *"Ardenza"* (R. 51). It does not appear but that the ship remained outside the heads for a much later period.

Moreover, Campanelli, according to his statement to Oftedal, while introduced to Henderson in the "Spring of 1923," did not enter the deal until later, and the commencement of the bank account, which included the sums received from the *"Ardenza,"* as well as the *"Frontiersman,"* did not start until July 21st, 1923 (R. 196). Accordingly it may be inferred that the *"Ardenza"* did not drop out of the enterprise until sometime late in 1924.

As to the Law.

There would be no objection to the evidence in that it concerned the same course of conduct as going on all along before the date mentioned in the indictment.

This precise application of the principle was made in the case of *Heike v. U. S.,* 227 U. S. 131, 145; 57 L. Ed. 450.

In that case the court pointed out that the indictment must of course charge a conspiracy not barred by the statutes, but that it was permissible to prove that the same course of fraud was entered long before and kept up.

This court referred to the same authority and made the same application of the principle in the case of *Houston v. U. S.,* 217 Fed. 852.

The conspiracy here was of a type found in several elaborate conspiracy cases recently prosecuted in various circuits of the United States and reported at length.

Thus a case of that type was

Remus v. U. S., 291 Fed. 501.

In that case the Circuit Court of the Sixth Circuit said:

> "The allegations of this indictment first above quoted clearly charges an existing conspiracy entered into between the defendants on April 20, 1919, and continuing until the time of the finding and presentation of the indictment, not for the commission of one offense only but for the commission of a continuity of offenses in violation of Title II of the National Prohibition Act by the unlawful transportation, possession and sale of intoxicating liquor (citing the Rudner case). If the purpose of the conspiracy contemplated the commission of one offense, the continuance of the result of the commission of that offense would not

necessarily continue the conspiracy; but if the purpose of the conspiracy contemplates, as charged in this indictment, continuous cooperation of the conspirators in the perpetration of a series of offenses against the United States within the scope and purpose of the conspiracy, it is in effect a 'partnership in criminal purposes' and continues until the time of its abandonment or the final accomplishment of its purpose. (Citing the case of *United States v. Kissell,* 218 U. S. 601; 54 L. Ed. 1168)."

And it was further said upon the authority of the *Ledbetter* case, supra:

"It was not necessary, however, for the government to prove that this conspiracy was formed on the exact date averred in the indictment."

And in the case of

Rudner v. U. S., 281 Fed. 516,

the same court said of a similar contention that there were a series of conspiracies between nonconfederate groups:

"Defendants contend that the evidence, if it shows any conspiracy, shows a series of conspiracies between nonconfederate groups of defendants. This contention grows out of this situation: The evidence shows without dispute (neither plaintiff in error testified) that the conspiracy was formed among the Canton defendants (some or all of them), of which conspiracy Ben Rudner was the head and front, embracing for its objects the various classes of acts charged in the indictment, and before any of the purchases of whisky involved in this case were made at Pittsburgh. The evidence is sufficient to sustain a conclusion that the conspiracy embraced broadly the pur-

chase by Ben Rudner of whiskey in Pittsburgh (or elsewhere, if more convenient), the illegal transporting of such whiskey to Canton, and its unlawful possession and sale there and in that vicinity. The testimony is to the effect that from the early part of the year 1920, until at least the month of October, Ben Rudner and his associates made a considerable number of wholesale purchases of whisky from Darling & Biener, at Pittsburgh, and that beginning about perhaps the middle of December, and for some months after that, similar purchases were made by Ben Rudner and his associates from the Naumans, or at least one of them.

The point raised is that, as the Naumans had nothing to do with any sales made by Darling & Biener, nor had Darling & Biener anything to do with sales made by the Naumans, and as those made by the latter were subsequent to those made by the former, there was thus no concert between Darling & Biener, on the one hand, and the Naumans, on the other. So far as the record shows the fact is as just stated; but in our opinion this does not subject either the indictment or the evidence to the criticism we are considering. A conspiracy under section 37 may be a continuous crime. Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136. It was open to the jury to find that the conspiracy between Ben Rudner and some or all of the other Canton defendants was not only the initial, but the substantial and continuing, conspiracy which had the objects already stated. The jury was instructed, and we think correctly, that one joining a conspiracy after its formation, by contributing to its carrying out with knowledge thereof, would be liable, and that it was not necessary that any party to the conspiracy should know all who were in it (Thomas v. United States (C. C. A. 8) 156 Fed. 897, 912, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720;

United States v. Standard Oil Co. (C. C. A. 8) 152 Fed. 290, 294, 295; and see United States v. L. S. & M. S. Ry. Co. (D. C.) 203 Fed. 295, 307); that it is enough that the Pittsburgh defendants knew that the Canton parties were engaged in that general conspiracy; and that it was not important whether one firm of Pittsburgh dealers know that the other Pittsburgh dealers were being similarly dealt with. The dropping out of Darling & Biener before the Naumans came in would thus not end such original conspiracy."

And in the case of

Ford v. U. S., 10 Fed. (2d) 338, 348,

it was said:

"It is contended that there was error in receiving the testimony of Sam Crivello about the liquor secured by him from the Norburn about the 1st of May, 1924, and delivered to Quartararo at Oakland creek. It is argued that this incident bore no relation to the conspiracy involved in the present prosecution. Plaintiffs in error cite Terry v. U. S., (C. C. A.) 7 F. (2d) 28, and Crowley v. U. S., (C. C. A.) 8 F. (2d) 118. These cases hold that, in a prosecution for conspiracy, the government's evidence must be confined to proof of the conspiracy charged, and the Terry case holds that 'the scope of the conspiracy must be gathered from the testimony'. Within these rules we think the testimony as to the Norburn incident was admissible. The Government explicitly proved that, prior to Crivello's reception of liquor from the Norburn, he had been employed by Quartararo to receive and transport liquor from various vessels and to deliver it to Quartararo at Oakland creek. Here was clear proof of a conspiracy between these two defendants, within the allegations of the indictment."

Another pertinent authority is the case of

Allen v. U. S., 4 Fed. 2d, 688.

In that case there was found an elaborate conspiracy to violate the National Prohibition Act involving a large number of persons, which the court found necessary to classify in separate groups, and it is seen from the groups referred to (Page 690) that certain of the groups probably had never heard of certain other groups, but were all part of the major conspiracy.

Manifestly in the instant case there was found such connection between the *"Ardenza"* and the conspiracy in which plaintiff in error was engaged.

As authority for the contentions of plaintiff in error here repeated references are made to the cases of

Crowley v. U. S.;
Terry v. U. S.

In those cases it was held that a particular incident should not have been proven, the theory being that the incident had no connection with the conspiracy proven. Thus in the *Crowley* case it was said of the incident that it did not appear to have had any relation to the charge of conspiracy for which the defendants were on trial; it did not tend to show that Crowley had acted in combination with any one named in the conspiracy charged, or that his possession of his liquor in August was part of a plan to violate the law subsequently, or that in any way it was *connected* with the offense under consideration.

Here the various means for carrying out the conspiracy and the various incidents in connection with such means in carrying out the conspiracy were all proper to be proved, being tied together, that is to say, closely connected with the main conspiracy of which *Henderson* was the head and *McMillan* and *Campanelli* principal lieutenants. The bank account was the same—it ran from July, 1923, to August, 1924; the mode of transacting the enterprise was the same at all times; the subject matter of the conspiracy was the same, as well as the purpose of the conspiracy. In a word, there was an elaborate enterprise wherein a man having apparently capital and resources undertook during the period from early summer of 1923 to the final failure of the enterprise in September or October, 1924 to introduce liquor into the San Francisco market from abroad. He would naturally be indifferent as to means as long as they were available and profitable; he was indifferent as to coadjutors, at times would take in one group, later drop them and take in another, but he did have plaintiff in error in close connection with him from the beginning to the end. It does not invade any of his rights, when on trial for his participation in such conspiracy, for the government to prove any or all of the means used.

(c) As to Testimony Concerning the "Mae Heyman".

It is contended that the court erred in receiving evidence concerning the vessel *"Mae Heyman"*. We think we show that the testimony would have been

properly received in the face of any objection, but we insist that under the record here there was no objection which the lower court could have considered. The matter is set forth in pages 46 and 47 of the Record wherein it is seen no objection or exception is taken until the testimony had all been received. Then a motion to strike out was made, denied and exception taken.

Moreover it was proper to show that any one of the conspirators was the owner or operator of the *"Mae Heyman,"* for it would have been proper to show that any one of them had means to carry out the criminal enterprise. Accordingly, any small boat could be shown to be owned or in the possession of McMillan, Henderson, Campanelli, or any other conspirator at material times.

A jury may be authorized to infer that a person owns property from a showing that he was in possession and exercising acts of ownership.

Cal. C. C. P., Section 1963, Subdivisions 11 and 12.

Therefore, it was proper to prove that McMillan purchased coal for the boat and had it delivered to the boat. The boat being thus shown to be in the possession and ownership of McMillan, the jury could well have inferred that the ownership and possession continued in the same condition from the short period from December to April.

It would be wholly immaterial whether the liquor subsequently found was beer or whiskey, or whether

it had been smuggled for *possession and sale* were purposes of the conspiracy, as well as smuggling.

As to the seizure of the *"Mae Heyman"* on April, 1924, that was also relevant; for at that very time there was a flagrant conspiracy existing between *Henderson, McMillan* and *Campanelli* to introduce liquor into San Francisco in small boats from the *"Ardenza"* outside. The facts that a small boat in the possession of one of the conspirators, laden with liquor, was apprehended in landing liquor in California at the very time would authorize the jury to infer that the *"Mae Heyman"* was one of the means of carrying out the conspiracy. It would be equivalent to the proof in the case of

Marron v. U. S., 8 Fed. (2d),

wherein it was held to be proper to prove that one of the conspirators had a stock of liquor at his home at 2031 Steiner Street, in that

> "The fact that McMillan was well stocked with liquor at this time was a circumstance which the jury had a right to consider."

This was said as to a claim that the matter was outside the conspiracy charged.

The acts of the *"Mae Heyman"* were within the allegations of the indictment in the sense that the boat was owned and used by one of the conspirators, *defendant McMillan,* and it was found *transporting* intoxicating liquor, the parties in charge, including McMillan, being in *possession* of the liquor, and the act being, as the jury may have inferred, under the

circumstances, an importation from a rum ship, shown to have been standing outside the heads of San Francisco, to the San Francisco market.

The contention that the *"Mae Heyman"* was not referred to in the indictment rests upon the assumption that since it was not referred to as one of the overt acts, it is thus left without the scope of the indictment. This involves a misapprehension of the bearing and purpose of allegations of overt acts, for as we have seen it is only necessary to allege that *one* conspirator committed *one* act, criminal or otherwise, to *effect* the *object* of the conspiracy. Accordingly it can be of no significance that any particular means used in carrying on the conspiracy would not appear to be set forth as an overt act.

In conclusion we submit that we have shown; that as to the greater part of the Government's argument in its former brief, the plaintiff in error does not further contend; that as to the assumed variance, his discussion wholly ignores relevant evidence; and that as to the proof of the use by conspirators of the *"Ardenza"* and the *"Mae Heyman"* as means useful or used to carry out the enterprise there could not have been an error. The case is not governed by the holding in the *Terry* or *Crowley* cases. It is more nearly in resemblance to the *Ford* and *Marron* cases. It is easily justified by the holding of such cases as

Allen v. U. S., supra;
Rudner v. U. S., supra;
Remus v. U. S., supra;

hereinabove referred to.

It is submitted that the judgment should be affirmed.

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